IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

SUIT No.1803 of 1980.

William Jacks & Co.(India) Ltd, incorporated and registered as a Private limited Company under the Indian Companies Act, VII of 1913 and deemed to be a Public Limited Company under Section 43-A of the Companies Act-1 of 1956, having its registered office at Hamilton House, Ballard Estate, Bombay- 400 038.

.. ..Plaintiff.

Versus.

Salzgitter Maschine AG, A Company incorporated and established under the provisions applicable in West Germany to limited companies having its registered office at 332, Salzgitter 51, Post Fach 511640, West Germany **.. .. Defendant.**

Mr K. K. Shroff i/b Jathar Dhru & Co.
Advocate for the Plaintiff.

None for the Defendants.

CORAM: V.C. DAGA,J.
DATED: 28th November,.2007.

JUDGMENT:

1. The plaintiff has filed the suit for recovery of commission in the sum of Rs.10,14,200/- with interest.

THE FACTS:

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2. The plaintiff is a Private Limited Company registered under Indian Companies Act, VII of 1913, having its registered office at Mumbai. It carries on business of representing and/or acting as sales agent for heavy machinery and other allied products of Foreign Manufacturers. According to the plaintiff, the defendant being one of them, incorporated in West Germany engaged in manufacturing heavy mining machineries and equipments including "pit props and sliding roof bars" for use in underground mines and tunnel construction, appointed plaintiff to act as their agent and representative.

3. The plaintiff claims to have negotiated agreement for collaboration to manufacture mining machineries in India under a licence as well as to act as it's representative for selling other products of the defendant. The plaintiff claims that as a result of prolonged discussion by the Managing Director of the plaintiff, Mr K. K. Jajodia with the defendant in West Germany on or about 17.10.1974, both of them entered into an agreement in the form of a letter addressed by

the defendant to the plaintiff which plaintiff claims to have accepted by signing at the foot and accepted terms and conditions thereof. That by the said agreement, the defendant appointed plaintiff as it's agent in India and authorized it to mediate sales in India for the products of the defendant viz. (a) machinery and equipment for underground mines, (b) equipment for tunnel construction; and (c) spare parts and accessories thereof. However, under clause 1 (b) of the said agreement, "pit props and sliding roof bars" ("the props" for short) which were manufactured by the defendant were excluded and it was contemplated that a special agreement in respect of sale thereof would be negotiated in future.

4. According to the plaintiff, by letter dated 19th November, 1974 the defendants entered into an arrangement and agreed to pay 5% commission on the F.O.B price on "Hydraulic Pit Props and sliding roof bars".

5. The plaintiff, in the plaint, further stated that due to it's efforts, M.A.M.C. had, infact, placed an order with the defendants on or about November-December, 1976

for purchase of Hydraulic Pit Props and its components. Details of which are given in the plaint, value of which in terms of Indian Rupee is shown in the sum of Rs. 2,02,84,000/-. As such, plaintiff claims to be entitled to claim commission thereon @ 5% amounting to Rs. 10,14,200/- i.e. the suit claim. According to the plaintiff, this amount was demanded by them by various letters addressed to the defendants. They did not pay this amount. Consequently, plaintiff was constrained to file this suit for recovery of the commission with interest thereon.

6. On being summoned, the defendant-company appeared and filed their written statement denying suit claim and the allegations made in the plaint, admitting letter dated 17th October, 1974, (Exh.A) and placed reliance on clause 1(b) of the said letter, which, specifically excludes their product "pit props and sliding roof bars" from the purview of the agreement. The defendant has further stated that by a separate letter dated 17.10.1974 addressed by them with respect to their product "Hydraulic Pit Props", the commission was to become payable only if the offered price for 6000 to 8000 props was accepted by

M.A.M.C. and if a letter of credit was opened by them latest by the end of November, 1974. This letter is not on record. Alternative pleadings of the defendant in the written statement is that, in the event plaintiff disputing their letter dated 17.10.1974, then the plaintiff is not entitled to set up claim on the basis of letter Exh.A annexed to the plaint with respect to their product pit props since the letter clearly provides for special understanding and negotiations for the said product. According to the defendant, there was no such understanding having been negotiated as such plaintiff is not entitled to claim any commission whatsoever.

7. So far as the letter dated 19.11.1974 addressed by the defendant to the plaintiff is concerned, according to the defendant, said letter was written subject to what was stated in the earlier letter dated 17.10.1974. The defendant has also denied that the plaintiff has made any efforts to procure said order from M.A.M.C.

8. The defendant did not admit

correspondence ensued during the years 1975 or 1976 placed on record. The defendant has also went on to plead in defence that the order of M.A.M.C. was not the product of the alleged efforts made by the plaintiff. The defendant has further stated in defence that the supply was made by them under licence and a collaboration agreement entered into between the defendant and the M.A.M.C. which came in to force on 16.10.1976 with which plaintiff was in no way concerned. The defendants have further reiterated that no orders were booked through or as a result of the alleged efforts of the plaintiff as alleged or otherwise.

9. In para 10 of the written statement the defendant has averred that though it had asked for inspection of the documents referred to and relied upon in the plaint, the plaintiff did not give inspection inspite of the orders passed by this Court in Chamber Summons No. 16 of 1984; wherein the plaintiff was directed to give inspection which the plaintiff did not give on the pretext that documents filed and relied upon by it in the plaint were misplaced. That is how, the defendant has denied claim of the plaintiff.

ISSUES FOR DETERMINATION:
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10. With the aforesaid pleadings on record, issues were framed by this Court, reading as under:

ISSUES:	FINDINGS:-
1. Whether the plaintiff proves that the plaintiff is a deemed Public Limited Company and is carrying on the business of representing and/or being sales agent for heavy machinery and other allied products of Foreign Manufacturers?	In affirmative.
2. Whether the plaintif proves that an Agreement was reached to pay the commission as per the terms stated in the letters dated 17th October, 1974 and 7th November, 1974 and as per the correspondence exchanged between the parties in this regard?	f In negative.
3. Whether the plaintif proves that an Agreement dated 19th November,1974 was arrived at between the parties whereby the plaintiff was entitled to the commission as per the terms stated therein?	f In negative.
4. Whether the plaintif proves that the suit is not barred by law of limitation?	f In negative.
5. What order and relief?	As per order below.

CONSIDERATION AND FINDINGS:

AS TO ISSUE No.4:

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11. Taking last issue first which revolves around the question of limitation, I am constrained to hold that suit is barred by law of Limitation. According to the para 7 of the plaint allegations are that the M.A.M.C. had placed orders with the defendant in or about November, 1976 for purchase of their products i.e. hydraulic pit props and components. If that be so,plaintiff became entitled to claim commission in the month of November, 1976. The limitation would, thus, start running from the month of December, 1976. The suit, in my considered view, ought to have been filed within three years from the date commission became due.

. The plaintiff, in para 13 of the plaint, has stated that the F.O.B. price of the goods was received by the defendant some time in March/April, 1978. There is no evidence on record in support of this assertion. The verification of the plaint is based on personal knowledge of Mr.K.K.Jajodia. He did not file his affidavit by way of evidence in

support of the assertion made in the plaint. In the affidavit (Exh. P-1) there is no mention any where as to when the alleged payment was received by the defendant with respect to supply of the alleged goods. Therefore, there is no evidence on record with respect to the receipt of price of goods by the defendant in the month of March or April, 1978 as alleged in the plaint. Considered from any angle, suit is barred by limitation. As such, the suit is liable to be dismissed on this count alone.

AS TO ISSUE No.1:

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12. In the affidavit filed on behalf of the plaintiff, so far as the issue no.1 is concerned, I do not see any dispute having been raised by the defendant with regard to the status of the plaintiff company. So far as nature of business is concerned, the affidavit filed on record makes out that case. Consequently, issue No.1 is answered in the affirmative i.e. in favour of the plaintiff.

AS TO ISSUE No.2:
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13. So far as the issue No.2 is concerned, it revolves around the agreement reached between the parties dated 17.10.1974 and the letter dated 7.11.1974. Letter dated 17-10-1974 is admitted by the defendant. As such, it is exhibited as Exh. P-1. Agreement dated 17.10.1974 (Exh.P-1) vide clause 1 (b) specifically excludes payment of commission in respect of "Salzgitter pit props and the sliding roof bars" for which a special understanding was to be negotiated. Consequently, the plaintiff is not entitled to base its claim on Exh.P-1 in respect of supply of the pit props and sliding roof bars.

14. Having said so, now, let me turn to the letter dated 7.11.1974. This letter is written by the plaintiff to the defendant. The said letter has not been proved by the plaintiff in accordance with the provisions of the Evidence Act as already stated hereinabove.

15. The plaintiff did not examine the scribe

of the said letter. The affiant has only stated that the said letter has been addressed to the defendant. He does not say who was the author of letter. He does not say that he is conversant with the signature of the author of the letter. He has not proved contents thereof. As a matter of fact, said letter is nothing but a typed copy without carrying any signature of the author of the letter. One does not know who had signed this letter. At the bottom of the letter, name of one Shri B. K. Jain, is typed. However, the said Jain has not been examined. No affidavit of said Jain, said to be author of the said letter, is filed.

16. Even secondary evidence is required to be proved as the substantive evidence. I am, therefore, constrained to record that neither the said document is proved nor the contents thereof are proved. Letter dated 7.11.1974 cannot, thus, be read in evidence. So far as other correspondence exchanged between the parties are concerned, it cannot be read for want of proof. Hence, issue no.2 is answered in the negative i.e. against the plaintiff.

AS TO ISSUE No.3:

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17. This issue revolves around letter dated 19th November, 1974. This letter has been admitted by the defendants in their written statement. The said document is,thus, marked as Exh.P-2. This letter, no doubt, refers to the negotiations with regard to the payment of 5% commission on Hydraulic Pit Props. But reading the entire letter clearly reveals that it was written when negotiations were at initial stage. This can be seen from 4th and 5th paras of the said letter, which read as under:-

> 4."As you know we, originally, wished to introduce our props through the company of Voltas Limited, Bombay and the respective contacts were made in the beginning of this year. This has been dropped now by the contacts to M.A.M.C. introduced to us by the Embassy but the tender of the props we first received through Voltas. This only to inform you, but we should now fully concentrate on getting the order and signing the licence agreement."
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> 5."As long as the licence agreement is not concluded we feel unable to appoint you to act as our exclusive agents for props and sliding roof bars as our decision is directly depending on the decision of M.A.M.C. This was explained already during Mr Jajodia's visit.

18. This letter (Exh.P-2), read as a whole, does not spell out any concluded agreement between the parties. As such, I am constrained to hold that there was no concluded contract between the parties so far as supply of "props" are concerned.

19. Apart from the above, the plaintiff has not led any documentary evidence to show nature of efforts made to secure order from N.A.M.C. Apart from the statement of one of its Officers on oath, no evidence is on record to show what efforts were made. When the order was procured, what was the value of the material ordered. When the payments were made. None of these facts are brought on record.

20. I may further observe that if it was a transaction brought about with the efforts of the plaintiff, then it was necessary for the plaintiff to produce some evidence on record to show how the transaction was routed through them. No material facts or material particulars in the form of evidence are on record.

21. In the above backdrop, if one turns to the verification clause of the plaint, which is in the nature of declaration made by Mr Sureshkumar Jajodia, he has declared that what is stated in the plaint are true to his own knowledge. It is, thus, clear that the plaint was not verified on the basis of the record but it was verified on the basis of the personal knowledge. It was, therefore, necessary for the plaintiff to examine Shri S.K. Jajodia or atleast to file his affidavit, who had personal knowledge of the facts of the subject transaction. As such, I am constrained to hold that the plaintiff failed to prove that they were or are entitled to commission as claimed in the suit.

22. In the result, suit is dismissed. Parties to bear their own costs.

(V.C. DAGA,J)